PRIME RADIANT PRODUCTIONS, INC.

"WE CAPTURE THE DREAM"

May 10, 1996

MAY 13 1996

Secretary
Federal Communication Commission
1919 M Street, N.W.
Washington, D.C. 20544

DOCKET FILE COPY ORIGINAL

Dear Sirs,

We request that the attached comments concerning CS Docket No. 96-60 be filed with the commission. We have included eleven copies to be filed with all commissioners as required.

Please notify us if there are problems with our submission.

Thank you for your cooperation in this matter.

Carl M. Burnett

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President & CEO

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FCC Comments

Before the

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation

(MM Docket No. 92-266)
(CS Docket No. 96-60)

To: The Commission

<u>COMMENTS TO IMPLEMENTATION OF SECTIONS OF THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992: RATE REGULATION - LEASED COMMERCIAL ACCESS</u>

Prime Radiant Productions, Inc.

We hereby file comments

Overall Comments:

The proposal by the commission to change the leased commercial access rate methodology from an implicit fee to a market-rate fee and cost-of-service rate is not supported by the legislative history concerning rate relief and previous FCC findings on this issue.

We opposed adoption of a market based leased commercial access methodology because a competitive market for leased commercial access does not exist today. In the May 3, 1993 Report and Order, the commission pointed out that of the three methodologies considered, benchmark, cost-of-service and market-based rates, the market-based rate methodology could be implemented "*where a competitive market exist for leased commercial access, cable operators would be able to charge the market rate for leased access. No comments were received indicating any competitive market for leased commercial access exist.... Consequently, this option does not appear to offer any promise as a tool for setting rates at this time*". As stated in paragraph 6 of the Notice, "*cable operators and programmers agree that relatively little leased commercial access capacity is being used by unaffiliated programmers*". This indicates that in many areas a leased commercial access marketplace does not exist. Any rate structure that relies on sufficient leased commercial access competition, as the basis for cable operators to charge a leased commercial access rate, would therefore require that the market-based rate methodology would only be applied to marketplaces where a competitive leased commercial access environment exist.

We opposed adoption of a cost-of-service rate methodology because the commission has already commented that it found that the cost-of-service rate methodology would likely require extensive accounting, record keeping and costing requirements. The commission also concluded that under this approach substantial migration would occur with possible harmful effects on the structure of the industry. Based on the commissions own research and opinions in this area, the conditions that exist in 1992 are also present in today's marketplace and therefore implementation of a cost-of-service rate methodology should not be attempted at this time. Additionally, the opportunity cost identified in the proposed methodology provides principally for the recover of lost advertising income. The inclusion of this income stream into the rate methodology suggest that the commission now recognizes that this income is significant. This recognition of advertising income by the commission was not expressed in the *U.S. Court of Appeals, Case No 93-1723, Time Warner Entertainment Co, L.P., ET AL., v. Federal Communication Commission*. Circuit Judge GINSBERG, writing in his opinion concerning rate relief asserts that *"As with its [the FCC] decision not to offset advertising revenues, however, the Commission's decision not to establish a general productivity offset could ultimately prove to be unreasonable if the Commission is ever confronted with evidence indicating that the cable industry does in fact benefit from productivity increases that significantly outstrip those in the general economy"* If the commission now recognizes that advertising revenue is a significant recoverable income which should be factored into a rate formula methodology, then the commission should first include such provisions in the calculation of the BST rate formula. If there is evidence that advertising revenue provides a *"productivity benefit"* then another BST rate adjustment may be in order. If, based on the result of the BST rate review, the commission finds that the BST rate should be adjusted downward, then the current leased commercial access rate would also be lowered thereby providing a lower leased commercial access rate which may provide access to more leased commercial access programmers. We therefore oppose the use of advertising income in the proposed leased commercial access rate methodology until it is factored into the BST rate analysis.

We also opposed adoption of a market-based or cost-of-service rate methodology based on the following additional concerns not previously identified in 1994. These rate methodologies proposed rely heavily on the preponderance of the information being fully disclosed by the cable operator. Furthermore the commission proposes a rate methodology requiring more intrusive and extensive cost based accounting. The type of information being requested under the proposed methodologies will require independent verification by programmers to support the "clear and convincing evidence" requirements in the event of a rate dispute. Furthermore, the information required to meet this "burden of proof" is only available to the cable operator through confidential programming and advertising agreements. Programmers will be required to obtain this information through a court ordered disclosure decree or an independent ADR procedure. This level of diligence required on the part of a programmer, to ascertain this critical information for leased commercial access rates, will discourage most, if not all potential leased commercial access programmers from filing a rate complaint to gain cable programming access. However, the commission proposes that in theory cable operators will supply this expanded confidential information with dispatch and forthright disclosure. It has been documented and verified by the commission, based on current rate disputes, that the easier implicit rate methodology is not being provided by cable operators in a timely fashion or with full disclosure. This finding by the commission resulted in the commission ordering cable operators to respond to leased commercial access rate requests within seven days. The proposed market-based and cost-of-service based rate methodologies will increase the amount of information disclosed by cable operators, and based on existing rate disputes may result in less information disclosed in a timely manner.

Additionally, the FCC in its 1994 Rate and Order specifically identified that the leased commercial access rate must be easy to determined by all parties. This requirement, to provide both the cable operator and the potential programmer easier documentation of rates, was the reason the commission adopted the implicit lease fee methodology over other methodologies. The commission also wanted to enable any adjudication authority the same ease of determining the leased commercial access rates. The commission further identified that programmers must be able to verify quickly the leased commercial access fee to determine if potential programming could be provided cost effectively. Therefore, we agree with the commission's 1994 finding that an implicit fee based methodology is a better rate methodology to use. We petition the commission to continue to use this rate methodology until more experience and additional data on leased commercial access can be obtained.

The commissions proposed leased commercial access rate methodology mandates that a comprehensive review of all cable access rules be conducted to fully address the fundamental issue concerning channel availability. In a larger context, the issues surrounding channel availability includes not only channel set-aside provisions under leased commercial access, but also the provisions concerning must-carry, retransmission consent and PEG programming. These legal provisions have provided preferential treatment to a unique segment of potential programmers wanting cable access. A discussion concerning any access provisions, or rates thereof, cannot be fully addressed without inclusion of all potential cable programmers who, under existing law, have channel set-asides or special access consideration

This matter is of such importance that the legal basis for must-carry rules are under review by the Supreme Court in the review of the case of *Time Warner Entertainment Co, L.P., ET AL., v. Federal Communication Commission, U.S. Court of Appeals Case No 93-1723*. Under the case to be reviewed by the court, the matter is being reviewed under the Free Speech Doctrine for constitutionality. However, this review opens issues concerning preferential treatment and set-asides for terrestrial broadcasters who provide programming over cable services. If, in the opinion of the court. it is found that these preferential set-aside rules, based on the Free Speech Doctrine are unconstitutional, the legal basis for preference based channel set-asides could be rendered unconstitutional and require changes in the provisions for PEG and leased commercial access programming.

The tenets and conditions of the Cable Television Consumer Protection and Competition Act of 1992 and the implementing provisions adopted by the commission in 1994 are still operative today. The commissions 1994 Rate and Order implementing provisions have been effective for less than two years and sufficient time to measure the effects of the Rate and Order rules concerning leased commercial access has not occurred. We therefore oppose modification of the current leased commercial access rate provisions at this time until better experience and information is available on a market to market basis. We also petition the commission to await the outcome of the Supreme Court review of the case of *Time Warner Entertainment CO, L.P., ET AL., v. Federal Communication Commission, U.S. Court of Appeals Case No 93-1723* before modifying the existing leased commercial access rate methodology

SPECIFIC COMMENTS REQUESTED:

A. MAXIMUM RATE FORMULA

1. The Cost Formula

a. Economic Justification (Paragraphs 65-74)

The conclusion by the commission that the maximum rate for leased access should depend on whether a cable operator is leasing it's full set-aside capacity and that leased commercial access set-asides should not impose a financial burden on the cable operator cannot be fully addressed in the limited context of leased commercial access. There are existing statues and policy requires cable operators to set-aside a potion of their cable channel capacity to groups provisioned with special treatment under the must-carry and PEG programming provisions. These categories of programmers are not required to economically justify their financial burden on the cable operator. In this regard, the record is documented with cables operators comments concerning the financial burden placed on the operator by requiring must-carry rules and PEG channel set-asides.

However, the commission has not reversed or modified it's positions concerning the requirement that cable operators provide channel capacity to these groups based on the economic impact they may have on the cable operator On the contrary, the fundamental reason for providing the set-asides for must-carry and PEG programming is based on the issue of providing diverse programming. This fundamental basis is the same basis for the set-aside provisions of leased commercial access and therefore the commissions presumption that the economic viability of the cable operators is a factor for the determination of leased commercial access rates is in contravention with the goals of providing diverse programming and the set-aside afford other categories of programmers. The commissions policy conclusion that leased commercial access should not be afforded a subsidy by cable operators significantly changes congressional intent on designating some portion of cable systems capacity for other categories of programmers.

The commission also concludes that a market power policy should be the basis for rate provisions and therefore access. However, each category of programmer today is bracketed with a government imposed set-asides If market power is to be the only basis for determining access provisions, then all set-aside requirements should be eliminated and market forces should be the preemptive conditions in providing access to programmers. However, it was not Congresses intent to allow the limited channel capacity to be driven strictly by market forces and therefore the set-aside provisions were implemented. Additionally, Congress by regulating cable implementation, viewed this industry as a public utility. Over the ensuring years channel capacity of this public utility has increased, yet sufficient capacity has not provided the requisite level to completely eliminate channel capacity set-asides. This is the major reason that programmer set-asides continue to exist. Therefore, in this context, we feel that the commissions conclusions to base leased commercial access set-aside on market power modeling, does not reflect actual implementation of cable set-aside policies and the current state of the entire cable programming environment

We therefore disagree, based on the discussion above, with the following conclusions by the commission:

(1) Maximum rate based on the operators reasonable cost.
(2) Leased commercial access rate provides a subsidy to the programmer.
(3) Elimination of leased commercial access programmer categories.

We agree with the commission with respect to allowing the leased access rate to be negotiated over the maximum lease rate once the set-aside requirements have been met. We agree with the commission that based on competition between all leased access programmers cable operators should be approved to charge the highest negotiated rate. However, we petition the commission to establish a mechanism to provide access based on competitive negotiations among the different programming categories if preference based set-asides remain intact.

b. Designating Channel. (Paragraphs 75-76)

The designation of channels for leased commercial access under the cost-of-service fee methodology is opposed based on the reasons cited above. However, if the commission implements a cost-of-service methodology then we petition the commission to require that cable operators include a percentage of the must-carry, retransmission and PEG channels in their channel designated.

c. Operating Costs. (Paragraphs 77-78)

Under the proposed operating cost portion of the formula the commission proposed to use the subscriber revenue derived by tier level as the operational cost. This methodology has limitations in determining the true operating cost of the cable operator. We propose that the operational cost portion of this formula include only those expenses that are accounted for as operating cost. This would include general administration, and direct personnel labor cost involved in operation of the cable system and other expenses that are deemed as operational under a cost accounting basis. The cost of advertising sales along with any system upgrades would not be included under this portion of the cost formula.

d. Net Opportunity Cost. (Paragraphs 79-89)

(1) Net Advertising Revenue Opportunity Cost (Paragraphs 79-82)

The use of a net opportunity cost for determining a leased access rate under the cost-of-service rate methodology is opposed based on the reasons cited above. However, if the commission implements a net opportunity cost-of-service rate methodology, then we petition the commission to adopt a methodology where the information is available for all parties to verify and use. We feel that the methodology proposed by the commission to determine the opportunity cost relies too heavily on information obtained from the cable operator. These cost, particularly the potential lost advertising revenue, should be derived by using independently provided potential advertising revenues. This method will allow for all parties concerned to derive the projected revenues independent of the cable operator and therefore allow a better verifiable level of advertising revenues.

(2) Net Programming Fees (Paragraph 83)

As previously discussed above the disclosure of programming fees paid by the cable operator is generally not be available because of confidential programming agreements between the program providers and the cable operators. This may require leased access programmers to obtain programming fees by court order or through the an ADR process. In many cases the procedural steps to gaining this information will discourage many leased access programmers from pursuing a commercial lease under the leased commercial access provisions. However, we agree with the commission that if a cost-of-service fee methodology is used the programming fees paid by cable operators should be included in the computation of the cost-of-service rate methodology.

(3) Technical Cost (Paragraph 84)

We agree with the commission that any technical fees be included in the cost-of-service rate methodology. However, the 1996 Cable Act placed a requirement that all programmers will need to have "closed captioning" as part of their programming in 1997. We feel that in many cases leased commercial access programmers will not be able to meet this requirement without the technical assistance of the cable operator. The commission should adopt rules that clarify the requirements for leased commercial access programmers and the associated cost of providing this capability.

(4) Subscriber Revenue (Paragraphs 85-86)

We disagree with the commissions proposal that cable operators should be remunerated for potential loss of subscriber revenue from BST service which may be attributed to a leased access programmer. As previously discussed we disagree with the methodology to eliminate the different categories of programmers if preference based set-asides remain intact.

(5) Dark Channel Opportunity Cost. (Paragraphs 87-89)

We disagree entirely with the commissions assumptions that a dark channel represents lost revenue to a cable operator. Under the current provisions of leased commercial access, a cable operator can substitute programming on its channel capacity until such time as a leased access programming agreement is signed. Cable operators therefore can use a dark channel without forgoing lost revenue. The commissions proposal to assign the lowest opportunity cost to a dark channel is in contravention with the current leased access provisions.

e. Averaging the Per Channel Costs for All Designated Channels. (Paragraphs 90-92)

We disagree with the average cost per channel methodology based on information provided above.

f. Calculating the Leased Access Programmer Charge (Paragraphs 93-94)

No Comment.

g. Adjustment for Part-time Administrative Cost. (Paragraph 95)

We disagree with the commissions proposal that only part-time administrative expense of the cable operator should be charged to the programmer. Uniform application of leasing rates and additional cost is currently allowed under the leased commercial access provisions. If the administrative expense for a full time programmer is less that that of a part-time programmer the cable operator should be given the right to recover administrative expenses regardless of the amount of time contracted.

2. Market Rate as Maximum Rate (Paragraphs 96-97)

We agree with the commissions proposal to allow cable operators to negotiate lease rates once their is sufficient competition in the marketplace for leased commercial access programmers. We do not foresee cable operators exercising editorial control over programmers once a market based rate methodology is instituted.

3. Transition Period (Paragraphs 98-99)

We disagree with the commissions proposal to replace the existing implicit fee rate with a cost-of-service or market-based fee rate methodology as previously stated above. When sufficient leased commercial access competition exist in the marketplace cable operators should be allowed to implement a market-based rate. However, when a sufficient leased commercial access marketplace place exist all current leased commercial access contracts should be reviewed for implementation of market-based rates at the anniversary of the contract initiation. Under this transition provisions the existing programmer should be given first right of refusal to re-negotiate their lease under a market-based rate methodology. Additionally, the programmer should have the right to continue the service beyond the contract expiration if a rate dispute requires resolution under ADR procedures. When a programmer willing stops programming or a rate dispute is agreed upon under ADR provisions, then the cable operator should be authorized to use market-based rate methodology.

4. Adjusting Leased Access Rates under the Cost-of-Service Formula Over Time. (Paragraphs 100-101)

We disagree with the commissions proposal to replace the existing implicit fee rate with a cost-of-service or market-based rate methodology until there is sufficient evidence that a leased commercial access marketplace exist

B. Part-Time Rates (Paragraph 102)

We agree with the commission that part-time rates should be allowable. We additionally agree that cable operators should be allowed to prorate the rates by daypart for part-time programmers. However, we petition the commission that the total of all part-time prorated rates should not exceed the 24 hour leasing rate

C. Preferential Access (Paragraphs 112-115)

a. General Comments on Not-for-Profit Programmers

As previously stated, the current provisions of the Cable Acts of 1984, 1992 and 1996 provide a preferential based programming environment based on programming classification. We agree that sufficient programming time should be afforded Not-for-Profit programmers. However, we find that sufficient capacity exists in the currently defined programming categories to accommodate Not-for-Profit programming. What is needed is clearer guidelines and provisions by the FCC to accommodate Not-for-Profit programming on PEG channels. If the commission requires local franchise authorities to accommodate Not-for-Profit programmers on unused PEG programming capacity or to open channel capacity for Not-for-Profit programming then the issue of access and rates would be eliminated. Until the FCC requires local franchise authorities to carry Not-for-Profit programming, then it will remain a hit-or-miss issue on whether Not-for-Profit programmers are granted access by local franchise authorities. Specific rules that need to be developed for local franchise authorities to implement PEG channel usage by Not-for-Profit programmers are

1. Definition of Not-For-Profit Programmer
2. Single Event Programming

3. Multi-Event Programming
4. Serial Programming
5. Resolution of Disputes
6. Certification required by Not-for-Profit Programmers.

We also petition the commission that the issue concerning carriage of LPTV stations should be addressed under Section § 543 of the must-carry provisions of law.

E. Obligation to Open New Channels and Bump Existing Non-Leased Access Services (Paragraph 124)

We agree with the commission that if a cable operator can accommodate a part-time leased access request on a comparable time slot on any tier level, then the operator should not be required to open another channel to accommodate the leased access request. We feel that the requirement to accommodate the exact time and the same audience size and profile for part-time leased access programming may not be possible. To compensate the leased access programmer for a different daypart or audience size and profile we petition the commission to establish rules that ensures the widest dissemination of the programming possible. If the placement of the programming results in placement on a tier other than the BST or is placed in a different daypart the operator is should be required to offset the reduced potential cable audience with a reasonable amount of marketing and advertisement to ensure that the leased commercial access program receives the widest marketing dissemination prior to program being aired. The determination of the "reasonable amount of marketing and advertisement" should be negotiated between the programmer and the cable operator based on mutually agreeable terms.

F. Selection of Programmers (Paragraphs 127-129)

This issue of selection of programmers has ancillary issues that need to be incorporated into the issue of "limited channel capacity available". In this regard, the part-time leased access programmer faces a significant burden of overcoming the potential for not being carried due to minimum time requirements or scheduling requirements. In our opinion, leased commercial access sub-leasing has the potential to solve many problem inherent with part-time programming. There may be an environment when a local leased commercial access "broker" could consolidate several part-time programmers to meet the time requirement restrictions and solve the issues concerning time slot programming. Under this proposal, the broker would negotiated with the cable operator for a significant amount of programming time, saving the cable operator administrative expense, programming expense and coordination. However, the leased commercial access broker would need to ensure that the total amount of sub-leases would not exceed the allowable fee for an entire channel. Additionally, the cable operator cannot require pre-screening consents if the broker certifies that all programming is content neutral. If, in the event that the content requires scrambling , the broker will be required to negotiate a separate lease agreement with the cable operator.

We agree with the commission that cable operators should have the discretion to select programming that will not "adversely affect the operation, financial condition, or market development of the cable system". the commission should adopt a policy of leased access sub-leasing by a broker agent. We petition the commission to adopt a policy of leased commercial access sub-leasing by a broker/agent to provide a better workable solution of providing a sufficient amount of programming to meet minimum leasing requirements.

<u>G. Minority and Educational Programmers</u> (Paragraph 132)

We disagree with the commission that programmers should be given a preference based on programming content as previously stated above. We additionally petition the commission not to fragment the current set-asides further to accommodate "special categories of programmers" if the current preference based set-asides remain intact. Under a market-based leased commercial access rate methodology, programming should be based on market forces once the cable operator has met its mandatory channel set-aside for leased commercial access. Additionally, local franchise authorities should be required to accommodate educational programming under PEG channels as stated in section C above.

<u>H. Procedures for Resolution of Disputes</u> (Paragraph 138)

We agree with the commissions assertions that the ADR process should be the first process used to resolve disputes. However, this remains true if the leased access fee rate methodology remains under a implicit fee methodology. The commissions assertion that the "rate calculations are based largely on questions of fact" are true under the current implicit fee rate calculation. We disagree with the commission that this will remain so under the cost-of-serve fee methodology. We additionally disagree with the commission that the rate information, under the cost-of-service fee methodology, should be computed by a independent CPA and retained at on file in a local public file at the franchisee. The commission is the federal agency to administer federal level statues concerning telecommunications and therefore Section § 612. Commercial leased access, under the proposed cost-of-service rate methodology, being a federal law and implemented through the commissions Rate and Orders, should require all cable operators to file the rate calculation with the commission whenever a request is received for the leased commercial access fee schedule. This filing will ensure that the underlying rate calculations used to determine the cost-of-service rate is provided to the federal body overseeing the implementation of leased commercial access. Additionally, this will ensure the confidential and proprietary information required to compute the cost-of-service rate is obtained and retained by the commission. If a potential leased commercial access programmers does not receive the information requested or challenges the rate, the commission will be able to quickly determine if the cable operator complied with the commissions seven day disclosure requirement and if rate calculations were correctly computed. It will also will streamline the commissions ADR process in the event of a rate dispute. We agree with the commission that no time limit should be imposed on the ADR process except as provided under the current ADR process guidelines.

I. Resale of Leased Access Time (Paragraph 141)

See Section F above.

Conclusion

In conclusion, the current leased commercial access rates provisions have been implemented for less than two years. Sufficient time has not occurred to allow a leased commercial access programming environment to be developed. We petition the commission to wait until a leased commercial access marketplace exist. We also petition the commission to wait for the outcome of the Supreme Court case concerning must-carry rules. We agree with the commission on implementation of a market-based rate methodology once a leased commercial leased marketplace is developed.

Respectfully Submitted,

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